IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

TERRY CUTRIGHT and JOHN WILSON
on behalf of themselves and others
similarly situated,

Plaintiffs,

v. **CIVIL ACTION NO. 2:16-cv-06346**

MAYOR DANNY JONES, individually
and in his official capacity, THE CITY
OF CHARLESTON, and its division
THE CHARLESTON POLICE DEPARTMENT,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION AND STATEMENT OF FACTS

In this matter, Plaintiffs, formerly homeless persons who trespassed on private property owned by Waste Management, seek declaratory and injunctive relief and money damages because they claim that the Defendants' actions of removing their persons, tents, food and other belongings from the private property they called "Tent City" violated their constitutional rights. Plaintiffs' claims should be dismissed as a matter of law against all Defendants because the Complaint, even when viewed in the light most favorable to the Plaintiffs, does not state a claim for which relief can be granted.

In the Complaint, Plaintiffs claim that the Defendants – Mayor Jones, members of the Charleston Police Department and other City of Charleston workers -- wrongfully removed them from private property owned by Waste Management and removed their personal property. Plaintiffs include references in the Complaint and in the Affidavits they attach to the Complaint to the fact that "Tent City" was located on private property owned by Waste Management, and that the alleged acts of the Defendants were taken on behalf of Waste Management at their request to remove the "Tent City" residents from their property. (http://wvgazettemail.com/news/20160119/charleston-mayor-orders-tent-city-dismantled) (Last accessed November 8, 2016) (Emphasis added); Compl. at ¶ ¶ 8, 21; Compl. Exhibit 2 at ¶¶ 5, 14, 15; Compl. Exhibit 1 at ¶ 7. Because Plaintiffs were trespassing on private property, they did not have a reasonable expectation of privacy in their personal property located on said private property and, as such, their Fourth Amendment rights were not violated.

Additionally, the Plaintiffs allege only one discrete act – the alleged "eviction" of "Tent City" on January 19, 2016 – and not a policy or custom and, as such, cannot sustain a Section 1983 Claim for violations of their constitutional rights.

Further, the alleged actions of the Defendants in providing law enforcement services to a local property owner, Waste Management, and the decision to exercise those services on January 19, 2016, constitute a method of providing police or law enforcement protection. Because the Defendants are a political subdivision and its official and department, the Defendants are immune from liability for all of the alleged state law claims pursuant to the law enforcement immunity contained within the Governmental Tort Claims and Insurance Reform Act, W.Va. Code § 29-12A-5(a)(5).

Mayor Jones is also entitled to qualified immunity from Plaintiffs' federal and state constitutional claims because he did not violate any clearly established constitutional rights. Finally, Plaintiffs have not plead sufficient facts to show a violation of their due process rights because they did not have a property interest in tents and other personal property located on real property they were occupying without the landowner's consent.

ANALYSIS

1. Plaintiffs' unreasonable seizure claims should be dismissed because Plaintiffs did not have a reasonable expectation of privacy sufficient to invoke the protections of the Fourth Amendment or the West Virginia Constitution in the personal property they stored on private property they were occupying without the landowner's permission.

Plaintiffs cannot state a claim for which relief can be granted for an unconstitutional seizure of property under the federal or state constitutions because they did not have an expectation of privacy that society is prepared to recognize as reasonable in personal property stored on land owned by a private property owner without permission.

The Supreme Court "has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of privacy" that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740–41, 99 S. Ct. 2577, 2580, 61 L. Ed. 2d 220 (1979) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387, and n. 12 (1978); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) at 150, 151, 99 S.Ct., at 434, 435 (concurring opinion); *id.*, at 164, 99 S.Ct., at 441 (dissenting opinion); *United States v. Chadwick*, 433 U.S. 1, 7, 97 S.Ct. 2476, 2481, 53 L.Ed.2d 538 (1977); *United States v. Miller*, 425 U.S. 435, 442, 96 S.Ct. 1619, 1623, 48 L.Ed.2d 71 (1976); *United States v. Dionisio*, 410 U.S. 1, 14, 93 S.Ct. 764, 771, 35 L.Ed.2d 67 (1973); *Couch v. United States*, 409 U.S. 322, 335–336, 93 S.Ct. 611, 619–620, 34 L.Ed.2d 548 (1973); *United States v. White*, 401 U.S. 745, 752, 91 S.Ct. 1122, 1126, 28 L.Ed.2d 453 (1971) (plurality opinion); *Mancusi v. DeForte*, 392 U.S.

364, 368, 88 S.Ct. 2120, 2123, 20 L.Ed.2d 1154 (1968); *Terry v. Ohio,* 392 U.S. 1, 9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889 (1968)). This inquiry involves two discrete questions:

> The first is whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy…whether, in the words of the *Katz* majority, the individual has shown that "he seeks to preserve [something] as private….The second question is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as 'reasonable,' …whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances.

Smith v. Maryland, 442 U.S. 735, 740–41, 99 S. Ct. 2577, 2580, 61 L. Ed. 2d 220 (1979) (internal quotations omitted) (quoting *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Rakas v. Illinois,* 439 U.S., at 143–144 n. 12, 99 S.Ct., at 430; *id.*, at 151, 99 S.Ct., at 434 (concurring opinion); *United States v. White,* 401 U.S., at 752, 91 S.Ct., at 1126 (plurality opinion)).

In *D'Aguanno v Gallagher*, 50 F.3d 877 (11th Cir. 1995), a case remarkably similar to the case at bar, the Eleventh Circuit Court of Appeals found that law enforcement officials' acts of entering onto a homeless campsite on private property and removing shelters and personal property did not constitute an unreasonable search and seizure noting that, "to invoke the protection of the Fourth Amendment, plaintiffs must show that they had a subjective expectation of privacy that society, at the time, was prepared to recognize as reasonable." 50 F.3d at 880. The Eleventh Circuit found that, "Plaintiffs have cited no authority which recognizes a person's right to privacy when he lives or stores his belongings on private property *without* the landowner's permission…." *Id.* In other cases, federal courts have found that trespassers do not have an expectation of privacy in their nontraditional shelters that society is prepared to recognize as reasonable. *United States v. Ruckman*, 806 F.2d 1471, 1472–73 (10th Cir. 1986).

In the matter before this Court, it is undisputed that "Tent City" was a campsite consisting of personal property and shelters located on private property without the landowner's consent, identical to the fact pattern at issue in *D'Aguanno*. In their Complaint, Plaintiffs incorporate by reference a Charleston Gazette-Mail article concerning "Tent City," in which the reporter repeatedly mentions the fact that the land upon which "Tent City" was located was private property and that the Defendants' actions were performed at the request of the private property owner, Waste Management. The article states, "Police and city workers ejected the 20 to 30 residents of Charleston's "Tent City" along the Elk River on Tuesday afternoon, under pressure from property owner Waste Management to remove the people living along the Elk River beneath the Spring Street Bridge." (http://wvgazettemail.com/news/20160119/charleston-mayor-orders-tent-city-dismantled) (Last accessed November 8, 2016); Compl. at ¶ ¶ 8, 21. The article goes on to state, "Jones says he met with officials from Waste Management Tuesday morning, which owns the property on which Tent City stands…. Jones said people have unplugged Waste Management's company truck chargers to run electricity to the encampment." *Id.* The article also quotes Waste Management's spokeswoman, Amanda Marks, as saying that Waste Management's employees had notified residents that they were trespassing on private property. *Id.* The article quotes a police officer as saying, "We're just here on behalf on [sic] Waste Management."

The Affidavits of Plaintiffs John Wilson and Terry Cutright that Plaintiffs attach as exhibits to the Complaint also reference Waste Management's involvement in the property and the "eviction" of the homeless persons from "Tent City." Specifically, Mr. Wilson describes the location of "Tent City" as "right downhill from the Waste Management facility," that the police officers who came to "Tent City" on January 19, 2016 "had a representative from Waste

Management and a lawyer with them" and says that the "police stated that they were removing people and dismantling Tent City on behalf of Waste Management." Exhibit 2 at ¶¶ 5, 14, 15. Mr. Cutright states that "[t]here was a lawyer representing Waste Management who came down to Tent City with the police that afternoon. He had a statement on a piece of paper saying that we were trespassing and could not remain on the riverbank or under the Spring Street Bridge, which he said was on Waste Management's property…." Exhibit 1 at ¶ 7.

Thus, based upon the article referenced in the Complaint and statements attached to the Complaint, "Tent City" was not located on public property but instead was located on private property without the landowner's consent. As such, even viewing the facts plead in the Complaint in the light most favorable to the Plaintiffs, the Plaintiffs did not have an expectation of privacy in their shelters and belongings located without permission on Waste Management's property that society is prepared to recognize as reasonable. Consequently, as a matter of law their Fourth Amendment rights were not violated, and the first and fourth causes of action in the Complaint should be dismissed as a matter of law.

2. Plaintiffs' claims should be dismissed because they have not demonstrated that Defendants' policies or customs deprived them of their constitutional rights under the federal or state constitution.

Plaintiffs' Section 1983 claims must fail as a matter of law because Plaintiffs seek to hold the City of Charleston and its police department vicariously liable for the acts or omissions of its employees and has not plead facts sufficient to support a finding that the City's policies or customs deprived them of their constitutional rights. Federal judges in the Southern District of West Virginia have noted:

> Although local governments are amenable to suit under Section 1983, they cannot be held vicariously liable…A local government only faces liability under Section

> 1983 when the execution of the government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983.

Weigle v Pifer et al, 139 F.Supp. 3d 760 (S.D.W.Va. 2015) (quoting *Monell v Dep't of Soc. Servs*., 436 U.S. 658, 98 S.Ct. 2018, 56 L. Ed. 2d 611 (1978)).

"A local government "policy" is made when an official or official body possessing final authority with respect to the action issues a proclamation, regulation, or decision." *Hutchison v. City of Huntington*, 198 W. Va. 139, 151–52, 479 S.E.2d 649, 661–62 (1996). "[T]he challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that* area of the city's business." *City of St. Louis v Praprotnik*, 485 U.S. 112, 124, 108 S.Ct. 915, 99 L. Ed. 107 (1988). There was no "policy" related to the removal of encampments. In the matter at hand, the mayor of the City of Charleston does not have exclusive or final authority with respect to the issuance of policies that would govern the police department in matters such as that alleged in the Complaint. Under the Charleston City Code:

> The chief of police, may from time to time prepare amendments and additions to and deletions from the police manual; and each such amendment, addition or deletion, or any combination, when approved by the *mayor* and when filed in the office of the city clerk for public inspection and use, with a copy being on file in the headquarters of the police department for inspection and use by all members of the department, shall be binding on all members of the department; and it shall be grounds for disciplinary action or penalty for any member of the police department to violate or fail to comply with any such amendment or addition which has been so promulgated, approved and filed.

City Code Section 66-34. Thus, it is the Chief of Police, with the review and approval of the Mayor, who makes policies for the Charleston Police Department, not the Mayor acting alone.

Furthermore, "to establish such a policy or custom, plaintiffs must show a persistent and widespread practice; random acts and isolated incidents are insufficient." *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1561 (U.S.D.C. S.D. Fla. 1992).

Here, in the case at bar, Plaintiffs do not show an official policy enacted by a final policy maker or a persistent and widespread practice, instead, they allege just the opposite – that the Mayor and the City had allowed the residents of "Tent City" to remain on the private property at issue for years and then, in an isolated incident on January 19, 2016, Mayor Jones "ordered the CPD to enter Tent City, and to remove and destroy the residences and personal property and possessions of the occupants of Tent City….." Compl. at ¶¶ 10-15. Thus, the allegations in the Complaint do not state a claim upon which relief can be granted for a § 1983 *Monell* claim, and Plaintiffs' First, Second, and Third Causes of Action should be dismissed as a matter of law.

3. Plaintiffs' state law claims should be dismissed because the City is immune from liability for the method of providing law enforcement or police protection pursuant to the Governmental Tort Claims and Insurance Reform Act.

Plaintiffs' state law claims fail to state a claim upon which relief can be granted because they seek to hold the Defendants, a political subdivision and its employees, liable for the method of providing police or law enforcement protection, something that the Defendants are immune from pursuant to the Governmental Tort Claims and Insurance Reform Act. W.Va. Code §29-12A-5(a)(5). The West Virginia Supreme Court of Appeals has interpreted this immunity as follows: "The phrase 'the method of providing police, law enforcement or fire protection' contained in W.Va. Code § 29-12A-5(a)(5) refers to the formulation and implementation of policy related to how police, law enforcement or fire protection is to be provided." Syl. Pt. 3, *Smith v. Burdette*, 211 W.Va. 477, 566 S.E.2d 614 (2002). The Court further held that the method of providing police or law enforcement protection "refers to the decision-making or the planning process in developing a governmental policy, including how that policy is to be performed…." Syl. Pt. 4, *Id.*

In a decision entered just last month, the West Virginia Supreme Court of Appeals revisited this code provision, in the context of fire protection, and further refined its holdings as follows:

> Statutory immunity exists for a political subdivision under the provisions of West Virginia Code § 29-12A-5(a)(5) (2013) if a loss or claim results from the failure to provide fire protection or the method of providing fire protection regardless of whether such loss or claim, asserted under West Virginia Code §29-12A-4(c)(3) (2013), is caused by the negligent performance of acts by the political subdivision's employees while acting within the scope of employment. To the extent that this ruling is inconsistent with syllabus point five of *Smith v Burdette*, 211 W.Va. 477, 566 S.E.2d 614 (2002), the holding as it pertains to the negligent acts of a political subdivision's employee in furtherance of a method of providing fire protection is hereby overruled.

Syl. Pt. 4, *Albert v. City of Wheeling*, Docket No. 15-0879 (October 27, 2016). While the issue of police protection was not before the Court in *Albert*, the same rationale used by the Court in interpreting the provision should apply equally to the police protection claims in the case at bar.

In the Complaint, Plaintiffs' state law claims all amount to allegations that the Defendant's method of providing law enforcement or police protection to Waste Management in assisting with disbursement of the homeless people who had trespassed upon Waste Management's property violated the Plaintiff's rights under the West Virginia constitution. While the allegations are insufficient to constitute a "policy or custom" sufficient to form the basis for a *Monell* claim, they do constitute claims that all arise from the method of providing law enforcement, and, as such, the Defendants, a political subdivision and its official, are all immune from such claims.

4. Defendant Mayor Jones is entitled to qualified immunity for alleged violations of the

Fourth and Fourteenth Amendments to the United States Constitution Under the Circumstances Alleged in the Complaint.

Defendant Mayor Danny Jones is entitled to qualified immunity from Plaintiffs' claims that their constitutional rights were violated. The United States Supreme Court has held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). An official's actions only violate a clearly established right when "in the light of preexisting law the unlawfulness" of the subject action is apparent. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Further, "[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). In determining whether the right violated was clearly established, the court defines the right "in light of the specific context of the case, not as a broad general proposition." *Parrish v. Cleveland*, 372 F.3d 294, 301-02 (4th Cir. 2004).

The United States Supreme Court has noted that the doctrine of qualified immunity "balances two important interests--the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 230 (2009). Both the U.S. Supreme Court and the Fourth Circuit Court of Appeals have noted that, "[q]ualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Willingham v. Crooke*, 412 F.3d 553, 559 (4th Cir. 2005) (*quoting Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)).

The Court has further noted that qualified immunity provides more than immunity from damages, but also affords immunity from the burdens of litigation itself. *Mitchell v. Forsyth*, 472

U.S. 511, 526 (1985) ("[q]ualified immunity provides 'an immunity from suit rather than a mere defense to liability…it is effectively lost if a case is erroneously permitted to go to trial.'"). In *Crawford-El v. Britton*, 523 U.S. 574, 118 S.Ct. 1584 (1998), the Supreme Court of the United States emphasized the need to resolve the issue of qualified immunity early in the litigation and noted that:

> If the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery . . . . To do so, the court must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law.

Crawford-El, 523 U.S. at 597, 118 S.Ct. at 1596. Thus, the Supreme Court has directed trial courts to protect the substance of the qualified immunity defense and protect public officials such as Mayor Danny Jones from unnecessary and burdensome discovery or trial proceedings before the adjudication of the qualified immunity defense. It is appropriate for this Court to adjudicate whether qualified immunity applies at this phase in litigation to prevent Mayor Jones from having to undergo unnecessary and burdensome discovery. In this matter, Mayor Jones is entitled to qualified immunity as a matter of law because he has not violated any constitutional right which was clearly established at the time of his alleged actions.

The test for qualified immunity is a two-pronged inquiry: "whether the facts . . . make out a violation of a constitutional right" and whether the right was "clearly established" at the time of the alleged conduct. *West v. Murphy*, 771 F.3d 209, 213 (4th Cir. 2014) *quoting Pearson v. Callahan*, 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). Law is clearly established if "'the contours of a right are sufficiently clear' that every 'reasonable official would have understood that what his is doing violates that right.'" *West*, 771 F.3d at 213, *quoting Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011) (additional citation omitted). "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *Id.*

In evaluating whether law was clearly established, the United States Court of Appeals for the Fourth Circuit ordinarily "need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose." *West*, 771 F.3d at 213, *quoting Lefemine v. Wideman*, 672 F.3d 292, 298 (4th Cir. 2012) (additional citations omitted).

There is no clearly established law in this Circuit or in West Virginia that put Mayor Jones on notice that his alleged actions with respect to the Plaintiffs would be unlawful or unreasonable under the circumstances presented; specifically, a homeless encampment on private property without the landowner's permission. The Fourth Circuit has recognized that in analyzing qualified immunity, "we are required to define the right in question 'at a high level of particularity,' and be mindful of the 'specific context of the case.'" *West*, 771 F.3d at 215-16, *quoting Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999) and *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

Assuming for purposes of this motion that Mayor Jones ordered the dismantling of "Tent City" as alleged by the Plaintiffs in their Complaint, he is entitled to qualified immunity because he was performing a discretionary function, and it has not been clearly established in the Fourth Circuit that dismantling a homeless encampment on private property constitutes a violation of the Plaintiffs' rights to be secure from unreasonable seizures, Plaintiffs' procedural due process rights, or Plaintiffs' substantive due process rights under the United States Constitution. There is no case on point in the Fourth Circuit suggesting that the alleged actions of Defendant Jones violated the Plaintiffs' rights. Absent such clearly established law, Defendant Jones is entitled to qualified immunity under the circumstances alleged by the Plaintiffs, because the existing law did not clearly establish that such a practice would run afoul of the Plaintiffs' constitutional rights under the circumstances of this case.

In *D'Aguanno v Gallagher*, 50 F.3d 877 (11th Cir. 1995), the United States Court of Appeals for the Eleventh Circuit reached the same conclusion with respect to the state of the law in the Eleventh Circuit. The plaintiffs in *D'Aguanno* were four homeless individuals who lived in shelters that they had built in a "homeless campsite" on undeveloped, private property, in Orange County, Florida, without the permission of the landowner. *Id.*, 50 F.3d at 878. They sued the Sheriff of Orange County and two deputy sheriffs for civil rights violations when their shelters and personal belongings were removed. *Id.*, 50 F.3d at 878-879.

With respect to the Fourth Amendment claim advanced by the *D'Aguanno* plaintiffs, the Eleventh Circuit found that "no case law is advanced to establish clearly that society recognized plaintiffs' expectation of privacy as reasonable under the facts of this case." *Id.*, 50 F.3d at 880. The Eleventh Circuit found that there was no authority "which recognizes a person's right to privacy when he lives or stores his belongings on private property *without* the landowner's permission." *Id.* (emphasis in original). Therefore, the defendants were entitled to qualified immunity on the Fourth Amendment claim.

With respect to the claim advanced by the *D'Aguanno* plaintiffs for violation of due process of law, the Eleventh Circuit similarly found that this right was not clearly established in this context. The Eleventh Circuit found that "[p]laintiffs have cited no authority that clearly states the circumstances in which homeless persons retain a property interest in the shelters they erect or whether homeless persons retain a property interest in shelters erected and property stored, without permission, on private property." *Id.*, 50 F.3d at 881.

Likewise, in the case at bar, there is no clearly established law in the Fourth Circuit that recognizes a Fourth Amendment privacy right or due process rights under the Fourteenth Amendment in the context of a homeless encampment on private property without the permission of the landowner. Therefore, Mayor Jones is entitled to qualified immunity under the circumstances alleged by the Plaintiffs.

5. **Defendant Mayor Danny Jones is Entitled to Qualified Immunity Under West Virginia Law for Alleged Violations of the West Virginia Constitution Under the Circumstances Alleged in the Complaint.**

As a public officer of a political subdivision, Mayor Danny Jones is protected from suit by qualified immunity under West Virginia law:

> Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.

Syl. pt. 4, *City of St. Albans v. Botkins*, 719 S.E.2d 863, 228 W.Va. 393 (2011), *quoting* Syllabus, *Bennett v. Coffman*, 361 S.E.2d 465, 178 W.Va. 500 (1987). Moreover, "[i]f a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby." Syl. pt. 6, *W. Va. Reg'l Jail and Correctional Facility Auth. v. A.B.*, 766 S.E.2d 751, 234 W. Va. 492 (2014), *quoting* Syl. Pt. 4, *Clark v. Dunn*, 465 S.E.2d 374, 195 W. Va. 272 (1995); Syl. pt. 8, *WVDHHR v. Payne*, 746 S.E.2d 554, 231 W.Va. 563 (2013) (additional citation omitted).

The West Virginia Supreme Court of Appeals has explained that "the question to determine entitlement to qualified immunity" centers on "whether an objectively reasonable official, situated similarly to the defendant, could have believed that his conduct did not violate the plaintiff's constitutional rights, in light of clearly established law and the information possessed by the defendant at the time of the allegedly wrongful conduct[.]" *City of St. Albans v. Botkins*, 719 S.E.2d 863, 868-869, 228 W.Va. 393, 398-399 (2011), *quoting Hutchison v. City of Huntington*, 198 W.Va. 139, 149, 479 S.E.2d 649, 659 (1996).

Qualified immunity is designed to protect public officials and agencies from the threat of litigation resulting from difficult decisions made in the course of their employment. *See e.g.*, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995). In order to overcome this immunity, it must be established that the agency employee or official knowingly violated a clearly established law, or acted maliciously, fraudulently, or oppressively. Syl. pt. 8, *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996); Syl. pt. 11, *W. Va. Reg'l Jail and Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014).

The Supreme Court of Appeals of West Virginia adopted the standard of the Supreme Court of the United States, holding that "[g]overnment officials performing discretionary functions generally are shielded from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *State v. Chase Securities*, 188 W. Va. at 362, 424 S.E.2d at 597, *quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed. 396, 410 (1982). Like its federal counterpart, qualified immunity under West Virginia law is an immunity from suit, not merely from liability, and should be determined early in the litigation:

The ultimate determination of whether qualified or statutory immunity bars a civil

> action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.

Syl. pt 1, *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996).

The Defendants deny that Mayor Danny Joes violated the Plaintiffs constitutional rights. However, even if his alleged actions could somehow be found to be violations of constitutional rights, Mayor Danny Jones is entitled to qualified immunity under West Virginia law because he violated no law that was clearly established at the time of the alleged events, and he would not have understood his actions to be unlawful based upon existing law.

6. Plaintiffs cannot demonstrate a violation of their procedural or substantive due process rights because they did not have a property interest in tents and other personal property located on private property without the landowner's permission.

As noted above in Section One, Plaintiffs do not have a reasonable expectation of privacy in property stored on real property owned by a private landowner who has not given permission for them to occupy the land. *See, D'Aguanno v Gallagher*, 50 F.3d 877. Thus, Plaintiffs can also not demonstrate a violation of their procedural or substantive due process rights, and, as such, those claims should also be dismissed as a matter of law.

CONCLUSION

For the reasons stated above, the Defendants respectfully request that this Honorable Court dismiss all claims against them with prejudice as a matter of law.

MAYOR DANNY JONES, THE CITY OF CHARLESTON and THE CHARLESTON POLICE DEPARTMENT,
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CERTIFICATE OF SERVICE

I, Karen Tracy McElhinny / Kimberly M. Bandy, counsel for Defendants, do hereby certify that a true and correct copy of the foregoing "Defendants' Memorandum of Law in Support of Motion to Dismiss" was filed on November 10, 2016 utilizing the Court's ECF Filing System which will provide a copy of same to:

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